IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ORIGINAL

SHALONG MAA,	§	
	§	
Plaintiff,	§	
	§	CIVIL ACTION NO.
VS.	§	
	§	3:03-CV-2721-K
ETHEL ROLLINS-CROSS, JESSICA HARRISON, VALENCIA MARTIN WALLACE, PETER DUNG VO, JOHN ROGER PARADISO,	§	
	§	
Defendants.		

MEMORANDUM OPINION AND ORDER

Currently pending before the Court is the Federal Defendants' Motion to Dismiss Plaintiff's Second Amended Complaint, or in the Alternative, for Summary Judgment, filed November 8, 2004. Having considered the merits of the Defendants' Motion to Dismiss, the pleadings, and the applicable law, the Court **grants** the motion because Plaintiff has failed to state a claim upon which relief can be granted, and because Plaintiff has failed to overcome Defendants' qualified immunity defense. Accordingly, Defendants' Second Motion to Dismiss is **granted**, and this case is dismissed with prejudice. All other pending motions are **denied as moot.**

I. Factual and Procedural Background

Plaintiff Shalong Maa ["Maa"], originally filed this suit on Nov. 10, 2003 against various employees of the United States Patent and Trademark Office ["USPTO"]. Maa is an inventor who submitted patent application No. 08/833, 342 for a computer-controlled talking action figure toy with animated features to the USPTO on April 4, 1997. The USPTO rejected this patent application on May 15, 2000. Maa alleges that his patent application was denied for seven years due to the intentional discrimination by patent examiners in reviewing his application based on his status as an independent and minority inventor and the fact that he was proceeding *pro se* in prosecuting his application. Thus, he contends that Defendants violated 42 U.S.C. § 1981by denying his application. He further alleges that the patent examiners conspired to deprive him of his rights under 42 U.S.C. § 1981 and 1985(3), as evidenced by their signatures on the Examiner's Answer and Examiner Action letters he received from the patent office. On appeal from the Examiner's rejection, the Board of Patent Appeals reversed and granted Maa's patent on June 3, 2003. He now sues for compensatory and punitive damages for the delay in issuing the patent.

Defendants filed their first Motion to Dismiss and Brief in Support Thereof on May 1, 2004. Defendants argued that pursuant to Fed. R. Civ. P. 12(b)(6), the Court should dismiss Maa's claims under 42 U.S.C. § 1981 and 1985(3) because 1) Maa's claims against the Defendants in their official capacity are barred by sovereign immunity;

2) Maa's claims against the Defendants in their individual capacity are barred by the doctrine of qualified immunity; and 3) Maa failed to properly state a claim under 42 U.S.C. § 1981 and 1985(3). Defendants further argued that the Court should dismiss Maa's Freedom of Information Act ["FOIA"] claim as moot.

On October 14, 2004, the Court ordered Maa to file a Rule 7(a) reply to answer the Defendants' affirmative defense of qualified immunity and granted Maa leave to file an amended complaint. On October 26, 2004, Maa filed his Rule 7(a) Reply and Second Amended Complaint. In his Second Amended Complaint, Maa dropped his FOIA claim, but made no other significant substantive changes to his complaint. Subsequently, Defendants filed their Motion to Dismiss Plaintiff's Second Amended Complaint, or in the Alternative, for Summary Judgment, and Brief in Support Thereof on November 8, 2004. Defendants assert that 1) Plaintiff's claims against the Federal Defendants in their individual capacities are barred by the doctrine of qualified immunity; 2) Plaintiff has failed to state a claim under 42 U.S.C. § 1981; and 3) Plaintiff has offered no evidence of a conspiracy in violation of 42 U.S.C. § 1985(3).

II. Standard of Review

A. *Pro se* Pleading Requirements

Defendants' Motion to Dismiss must be evaluated in light of the fact that Maa is a *pro se* litigant and therefore should not be held to the same standards of pleading as an attorney. *SEC v. AMX Intl., Inc.*, 7 F.3d 71, 75 (5th Cir. 1993). Maa's pleadings and

briefs should be liberally construed. *Haines v. Kerner*, 404 U.S. 519, 520 (1972)(stating that the court holds allegations by a *pro se* plaintiff to a less stringent standard); *Perez v. United States*, 312 F.3d 191, 194-95 n. 13 (5th Cir. 2002); *AMX Intl.*, 7 F.3d at 75.

B. Rule 12(b)(6) Motion to Dismiss

Upon consideration of a motion to dismiss, the Court must presume all well-pleaded facts in Maa's Second Amended Complaint to be true, and resolve any ambiguities or doubts regarding the sufficiency of his claims in his favor. *Kane Enterprises v. MacGregor (USA) Inc.*, 322 F.3d 371, 374 (5th Cir. 2003); *Campbell v. Wells Fargo Bank*, 781 F.2d 440, 442 (5th Cir. 1986). Further, the Court may not dismiss the complaint under Fed. R. Civ. P. 12(b)(6) "unless it appears beyond doubt that [Plaintiff] can prove no set of facts in support of their claims which would entitle [him] to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). However, Maa must plead specific facts, not mere conclusory allegations, to avoid dismissal for failure to state a claim. *Kane Enterprises*, 322 F.3d at 374; *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir. 2000). Dismissal is proper when "even the most sympathetic reading of [the] pleadings uncovers no theory and no facts that would subject the present defendants to liability." *Jacquez v. Procunier*, 801 F.2d 789, 791-92 (5th Cir. 1986).

The court must allow a *pro se* plaintiff an opportunity to amend his complaint before dismissing the case based on Rule 12(b)(6). *See Bazrowx v. Scott*, 136 F.3d 1053, 1054 (5th Cir. 1998) (holding that generally a district court errs if it dismisses a *pro se*

complaint for failure to state a claim on which relief can be granted under Rule 12(b)(6) without giving the plaintiff an opportunity to amend). On October 14, 2004 the Court granted Maa leave to file a second amended complaint stating a claim for which relief may be granted. Maa filed his Second Amended Complaint on October 26, 2004. Therefore, the Court has given Maa fair opportunity to plead his case and may properly consider dismissal at this time.

III. Discussion

A. Rule 12(b)(6) Motion to Dismiss

Defendants have moved to dismiss Maa's Second Amended Complaint based on Rule 12(b)(6), contending that Plaintiff has failed to state a claim upon which relief can be granted under 42 U.S.C. § § 1981 or 1985(3).

1. 42 U.S.C. § 1981

Section 1981 states in pertinent part that "all persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts... and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens..." 42 U.S.C. § 1981(a) (2004). Section 1981 does not forbid all types of discrimination; rather it only bars discrimination in certain contract-related acts, and only if the discrimination in question is both intentional and based on race. *See Bellows v. Amoco Oil Co.*, 118 F.3d 268, 274 (5th Cir. 1997); *Coleman v. Houston I.S.D.*, 113 F.3d 528, 534 (5th Cir. 1997). It is

further limited by the impairment clause in section 1981©) which limits those who may be prosecuted under section 1981 to non-governmental discrimination and impairment under color of State law. There are two types of protected activity under 42 U.S.C. § 1981: (1) the right to make a contract, and (2) the right to full and equal benefit of the laws. 42 U.S.C. § 1981 (2004). The terminology 'to make and enforce a contract' includes "the making, performance, modification, and termination of contracts..." 42 U.S.C. § 1981(b) (2004).

Maa has not pleaded that the patent application should be treated as a contract. For this reason, he cannot rely on the protection afforded under section 1981 to make and enforce a contract. Instead, Maa claims that by denying his patent application Defendants have denied him the full and equal benefit of intellectual property laws. Maa has not established that the denial of a patent application with appropriate citations to prior art creates a cognizable constitutional claim. Accordingly, Maa has failed to state a claim under this provision of section 1981.

Additionally, plaintiffs who make no allegations of discrimination based on race, alienage, ancestry, or ethnic characteristics, and who do not present to the court any evidence indicating such discrimination, cannot assert a claim under section 1981. *Weseman v. Meeker County*, 659 F. Supp. 1571 (D. Minn. 1987); *See also, Morris v. Dillard Dept. Stores, Inc.*, 277 F.3d 743, 750 (5th Cir. 2001). Maa claims that he was purposefully discriminated against because he is an independent and minority inventor

and was acting *pro se* in the prosecution of a patent application. Plaintiff's Second Amended Complaint at ¶¶14, 18. He does not allege that his "minority" status is because of his race, and does not otherwise plead that Defendants denied his patent application due to his race. Moreover, although Defendants identified this deficiency in their first motion to dismiss, Maa continues to rely on his "minority inventor" language in response to the Court's Order entered October 14th warning him that he needed to plead with greater specificity. In his Rule 7(a) reply, Maa adds no factual detail to his assertion that the Defendants purposefully discriminated against him, but again refers to his "independent and minority inventor" language in his Second Amended Complaint and insists that it is sufficient to establish that Defendants denied Maa's claims on the basis of race. Plaintiff's Rule 7(a) Reply at ¶5.1.

Additionally, an individual prosecuting a patent *pro se* does not belong to a protected class under section 1981, and Maa provides no authority that such inventors are a protected class under the statute. Because Maa pleads no facts describing whether his minority status relates to his status as an independent inventor or is based on race, alienage or ancestry, his section 1981 claim is insufficient and must fail.

Maa has not sufficiently pleaded facts that, if taken as true, would establish the required elements of this cause of action. There are no facts, or even conclusory allegations, in his pleading that his patent was not approved due to racial discrimination. Maa makes no assertion that he is a member of any class protected under section 1981

despite taking into account the liberal pleading requirements for a *pro se* plaintiff. Consequently, Maa's claims against the Defendants are dismissed with prejudice for failure to state a claim under Fed. R. Civ. P. 12(b)(6).

2. 42 U.S.C. § 1985 (3)

Under 42 U.S.C. § 1985(3), a plaintiff must allege: (1) a conspiracy involving two or more persons; (2) for the purpose of depriving, directly or indirectly, a person or class of persons of the equal protection of the laws; and (3) act in furtherance of the conspiracy; (4) which causes injury to a person or property, or deprivation of any right or privilege of a citizen of the United States; and (5) the action of the conspirators is motivated by a racial animus. *Brotherhood of Carpenters and Joiners of America, Local 610 v. Scott*, 463 U.S. 825, 828-29 (1983); *Horaist v. Doctor's Hosp. Of Opelousas*, 255 F.3d 261, 270 (5th Cir. 2001); *Hilliard v. Ferguson*, 30 F.3d 649, 652-53 (5th Cir. 1994); *Wong v. Stripling*, 881 F.2d 200, 202-203 (5th Cir. 1989). Plaintiff must plead the operative facts upon which his claim is based. *Holdiness v. Stroud*, 808 F.2d 417, 424 (5th Cir. 1987). Mere conclusory allegations are insufficient. *Id.*

If a plaintiff fails to assert a racial or class based animus as motivation for the acts of the conspirators his claim must fail. *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971); *La Bar v. Royer*, 528 F.2d 548 (5th Cir. 1976). Likewise, if he asserts existence of a class without providing supporting details, and there is no indication that anyone else ever had been or will be a member of the alleged class, dismissal of such civil rights

actions is warranted. *McLellan v. Mississippi Power & Light Co.*, 526 F.2d 870 (5th Cir. 1976). The Fifth Circuit has specifically held that *pro se* plaintiffs do not constitute a class for whose members section 1985(3) provides a remedy. *Eitel v. Holland*, 787 F.2d 995, 999 (5th Cir.), modified on reh'g, 798 F.2d 815 (5th Cir. 1986).

There are no facts in Maa's Second Amended Complaint that, taken as true, could lead to the determination that Maa's minority status is based on race, alienage, or ancestry. All Plaintiff alleges is that he was purposefully discriminated against because he is an independent and minority inventor and was acting *pro se* in the prosecution of a patent application. Plaintiff's Amended Complaint at ¶¶ 13,18. He fails to use the term "racial discrimination" or any other indicator that would suggest his minority status is based on race. He continues to rely on his the "minority inventor" language despite the Defendants pointing out the deficiency in their Motion to Dismiss and the Court's explicit warning that greater factual detail was necessary to support his claim. Because Maa has failed to assert a racial or class based animus as motivation for the acts of the purported conspirators, this claim is properly dismissed with prejudice pursuant to Fed. R. Civ. P. 12(b)(6).

B. Qualified Immunity

Beyond their argument that Maa has failed to state a cognizable claim under either 42 U.S.C. § 1981 or 1985, Defendants assert that they are immune from suit under the doctrine of qualified immunity. Qualified immunity protects government

officials performing discretionary functions from civil liability if their conduct violates no clearly established statutory or constitutional right of which a reasonable person would have known. *See Sorenson v. Ferrie*, 134 F.3d 325, 327 (5th Cir. 1998) (qualified immunity protects government officials from civil liability in most cases). The burden is on the examiner to affirmatively allege the immunity defense, and to demonstrate "that the allegedly wrongful actions...'were undertaken pursuant to the performance of his duties and within the scope of his discretionary authority." *Williams v. Treen*, 671 F.2d 892, 896 (5th Cir. 1982) (quoting *Barker v. Norman*, 651 F.2d 1107, 1124-25 (5th Cir. 1981)). Once the defendant establishes this defense, the burden shifts, and the plaintiff must prove, subject to a heightened pleading standard, that the defendant's action violated clearly established law. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *See Wicks v. Mississippi State Employment Services*, 41 F.3d 991, 997 (5th Cir. 1995).

The Court has the discretion under Fed. R. Civ. P. 7(a) to require the plaintiff to answer the assertion of qualified immunity with detail and particularity in order to meet this burden. *Schultea v. Wood*, 47 F.3d 1427, 1433-34 (5th Cir. 1995). Consequently, on October 14, 2004, the Court ordered Maa to file a Rule 7(a) reply, stating with factual detail the basis for his claim including why the Defendants cannot maintain the defense of qualified immunity. The Court also granted Maa leave to amend his complaint. *Wicks*, 41 F.3d at 997 (stating that ordinarily the district court should not

dismiss a case when the Plaintiff has only filed one pleading and has not had the opportunity to meet his burden).

Maa filed his Rule 7(a) Reply and a Second Amended Complaint on October 26, 2004, but failed to provide more than bald allegations and conclusory statements that the Defendants failed to follow clearly established law. *Streetman v. Jordan*, 918 F.2d 555, 557 (5th Cir. 1990). The Court has provided Maa with a fair opportunity to plead his case with specificity and defend against the assertion of qualified immunity, thus dismissal may be properly considered at this time. *See Jacquez v. Procunier*, 801 F.2d 789, 792 (5th Cir. 1986) ("plaintiffs cannot be allowed to continue to amend or supplement their pleadings until they stumble upon a formula that carries them over the threshold...at some point a court must decide that a plaintiff has had a fair opportunity to make his case."); *see also Babb v. Dorman*, 33 F.3d 472, 479 (5th Cir. 1994) (further pleading "would do nothing but prolong the inevitable and would only subject the defendants to exactly those hardships the [qualified] immunity doctrine is supposed to relieve.").

The Supreme Court has established a two-part test to overcome the qualified immunity defense. *Siegert v. Gilley*, 500 U.S. 226, 231-32 (1991). Under the first part, the district court must determine whether there has been an alleged constitutional or statutory violation. *Id; see also Jacquez*, 801 F.2d at 791 (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Because the Court must decide exactly what constitutional or

statutory rights might have been violated, plaintiff's claim must be carefully characterized from the outset. *Connelly v. Comptroller of the Currency*, 876 F.2d 1209, 1212 (5th Cir. 1989). The second part requires the district court to make two separate inquiries: (1) whether the right was "clearly established" at the time of the incident; and if so (2) whether the defendant's conduct was objectively unreasonable in light of the clearly established law. *Siegert*, 500 U.S. at 231-32; *Hare v. Corinth*, 135 F.3d 320, 326 (5th Cir. 1998).

First, the Defendants in this action have established that they are entitled to the qualified immunity defense. The patent examiners were exercising their statutorily authorized duty to review and, based on their discretion, grant or deny patent applications. *See* 35 U.S.C. §131; *Application of Winston*, 365 F.2d 1017 (Cust. & Pat. App. 1966); *Application of Lee*, 193 F.2d 186 (Pat. App. 1951). By denying Maa's patent application with appropriate references to prior art, Defendants were clearly acting within the boundaries of their discretionary authority.

In his Rule 7(a) Reply and Second Amended Complaint, Maa attempts to carry his burden of showing that Defendants violated clearly established law by alleging a Fifth Amendment constitutional violation, and statutory violations of 35 U.S.C § 131 and 42 U.S.C. § 1981. First, Maa alleges that "the purpose of these acts and conducts [of the Defendants] is to deprive Plaintiff of...the full and equal benefit of the intellectual property laws..in violation of the due process clause of the Fifth Amendment." Plaintiff's

Second Amended Complaint at ¶14. He argues that "[D]efendant's refusal of applying legal authorities in rejecting the Plaintiff's Patent application were certainly in violation of the due process clause of the Fifth Amendment, because it constitutes deprivation of the Plaintiff's intellectual property rights 'without due process of law." Plaintiff's Rule 7(a) Reply at ¶ 7.3. However, Maa cites no precedent stating that rejection of a patent application amounts to a Fifth Amendment due process violation.

Maa's attempt to carry his burden by alleging a violation of 35 U.S.C. § 131 also fails. Maa incorrectly alleges that 35 U.S.C. § 131 requires patent examiners to apply only legal authorities when rejecting patent applications. 35 U.S.C. § 131 simply instructs the examiner to issue a patent if the examiner finds that the applicant is entitled to one. 35 U.S.C. § 131 (2004). Further, the patent examiners' failure to cite 'legal authority' and only listing prior art as reasons for the rejection are not objectively unreasonable, because it is the regular practice of patent examiners to reject patents on these grounds. *See e.g., Diamon v. Diehr,* 450 U.S. 175 (1981); *Zero Mfg. Co. v. Mississippi Milk Producers Ass'n,* 358 F.2d 853 (5th Cir. 1966).

Maa's allegation that Defendants' actions were in violation of 42 U.S.C. § 1981 also fails to carry his burden. Again, there is no precedent that rejecting a patent without applying legal authorities is a violation of section 1981. 35 U.S.C. § 132 states that when a claim for a patent is rejected, the Director shall notify the applicant, and state the reasons for the rejection together with such information and references as may

be useful in judging of the propriety of continuing the prosecution of his application. The patent examiners have complied with section 132 by citing prior art references in their rejection. Maa cites no authority holding that a patent examiner must cite legal authority when rejecting a patent. Because no benefits of any law or statutory guideline were denied to Maa by Defendants, he cannot rely on the protection afforded under section 1981 for full and equal benefits of the law.

Defendants are entitled to the qualified immunity defense because they were acting under color of federal law and within the scope of their authority. Maa has failed to allege a set of facts that show a violation of a clearly established law, or that Defendants' actions were objectively unreasonable. Therefore, Maa's claims must be dismissed for this additional reason.

IV. Conclusion

For the reasons stated above, Defendants' Second Motion to Dismiss is **granted.** Plaintiff's claims are dismissed with prejudice. Consequently, all other pending motions are **denied as moot.** Judgment will be entered by separate document.

SO ORDERED.

January 11th, 2005.

ED KINKEADE
UNITED STATES DISTRICT JUDGE

ORIGINAL

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JUDGMENT

This judgment is entered pursuant to the court's Memorandum Opinion and Order granting Defendant's Motion to Dismiss Plaintiff's Second Amended Complaint.

It is hereby ORDERED, ADJUDGED and DECREED that Plaintiff take nothing by his suit against Defendants, and that his claims are DISMISSED with prejudice. All costs are taxed against Plaintiff.

January 11th, 2005.

Ed Kinkeade

ED KINKEADE
UNITED STATES DISTRICT JUDGE